STATE OF SOUTH CAROLINA
COUNTY OF JASPER

David W and Jane B Disney,
Appellant,

v.

CITY OF HARDEEVILLE,
Respondent.

Hardeeville Board of Zoning Appeals

REPLY BRIEF

Now comes Respondent, City of Hardeeville (hereinafter referred to as "Hardeeville" or "Respondent" interchangeably), by and through undersigned counsel pursuant to Municipal Zoning and Development Ordinance of the City of Hardeeville, South Carolina Article 7.11, in this Brief of Respondent responds to the Appellant's Appeal from Action of Zoning Official and respectfully requests the Board dismiss the appeal or in the alternative affirm the Appellant's conviction.

SCOPE OF REVIEW

The Comprehensive Planning Act of the State of South Carolina lists the powers of the board of zoning appeals. The powers of the board are limited to three specific subject matter areas: determining appeals from administrative decisions of the zoning administrator; granting or denying applications for variances, and granting or denying applications for special exceptions. S.C. Code Ann § 6-29-800. The Board also holds a limited fourth power to remand a matter to the zoning administrator if the record is insufficient for the board's review. S.C. Code Ann. § 6-29-800(A)(4). The matter before you is an appeal of an administrative decision of the zoning administrator. The board has exclusive power to hear and decide appeals where it is alleged the zoning administrator, in the enforcement of the zoning ordinance, erred in an order, requirement,

decision or determination. In such cases the board may reverse or affirm, wholly or in part, or may modify the order, requirements, decision or determination of the zoning administrator. S.C. Code § 6-29-800 (A)(1) and (E).

FACTUAL BACKGROUND

On November 11, 2018, Thomas & Hutton on behalf of Sun City Hilton Head Community Association, Inc. (hereinafter referred to as "Applicant" and "Sun City" interchangeably) submitted a Development Permit Application to the City of Hardeeville (hereinafter referred to as the "City"). The Municipal Zoning and Development Ordinance (hereinafter referred to as "MZDO") states that no development can occur in the City without a development permit. The City reviewed the permit application with the requirements set forth in the MZDO, which include that the Applicant must provide approvals and for documentation from Beaufort Jasper Water and Sewer Authority, the South Carolina Department of Health and Environmental Control and Jasper County E911. Each of these departments conduct individual reviews of proposed developments over which the City has no authority or control. The application submitted by Sun City met all requirements of the MZDO and as such was approved by the local administrator, hereinafter referred to as "local administrator" or "zoning official" interchangeably.

The Appellant argues the following grounds for appeal of the decision of the local administrator:

1. "The property in question and proposed for Comfort Station is designated as Common Property. As per this declaration contains an arbitration agreement subject to the South Carolina Arbitration Act, Section 15-48-10, et seq. Code of Laws of South Carolina, 1976; Second Amended and Restated Declaration

of Covenants, Conditions, and Restrictions for Sun City Hilton Head it is understood by appeal applicants that the parcel of land designated for said Comfort Station is Common Property which the Home Owners Association now or hereafter owns, leases or otherwise holds possessory or use rights in the common use and enjoyment of owners."

2. "It is believed by applicants that since the property is common property it is not a "Golf Course", i.e., a parcel of land adjacent to or within the Properties developed by the Declarant or any affiliate or designee of the Declarant (a) which is owned by the Association or which is a Private Amenity, and (b) which is operated as a golf course. The Common Property in question is bounded by "Freshwater Wetlands," Kings Creek Drive, and a residence at 162 Kings Creek Drive."
3. "Since this is not "Golf Course," surrounding property owners within 500' of the property in question were not notified of variance or special use request of this Common Property by certified mail no less than 15 calendar days prior to application of variance by developer."
4. "At no time during the sale of properties at 161 and 162 Kings Creek Drive including landowners within 500' of proposed Comfort Station was proper notice in writing or verbal given to or made aware of 1.26 "Master Plan"
5. "At no time following purchase of 161 and 162 Kings Creed Drives was a balloted vote advertised to all Owners with SSHH. There has never been a public hearing of this zoning application as conducted by "City".
6. Homeowners have a "right" to "quiet enjoyment" and comfort station is an

"attractive nuisance"

7. Proposed construction will bring upsets and increase disturbances due to golf cart traffic and maintenance on structure and it infrastructure
8. This is a "non-conforming use of property" within a residential neighborhood
9. Home and property values are affected.
10. Appellant also provides various grievances in Exhibit D, E-1, E-2, F-1 and F-2 regarding the "Schedule of Fees and Community Rules 2019"

For the reasons set forth below, the local administrator's approval of the development permit should be affirmed.

ARGUMENT

I. "The property in question and proposed for Comfort Station is designated as Common Property. As per this declaration contains an arbitration agreement subject to the South Carolina Arbitration Act, Section 15-48-10, et seq. Code of Laws of South Carolina, 1976; Second Amended and Restated Declaration of Covenants, Conditions, and Restrictions for Sun City Hilton Head it is understood by appeal applicants that the parcel of land designated for said Comfort Station is Common Property which the Home Owners Association now or hereafter owns, leases or otherwise holds possessory or use rights in the common use and enjoyment of owners.

The Scope of Review for the Board of Zoning Appeals is limited to hear and decide appeals where it is alleged the zoning administrator made an error in an order, requirement, decision or determination in the enforcement of the zoning ordinance. S.C. Code Ann. § 6-29-800(A)(1). The Appellant cites a portion of the community covenants, conditions and restrictions which requires arbitration as a ground for appeal. The MZDO does not require for the review of community covenants, conditions or restrictions when granting a development permit. The Zoning Administrator is only authorized to review an application to assure all requirements of the MZDO

have been satisfied. MZDO Section 9-33. Since the community covenants, conditions or restrictions are not a part of the development permit review, the zoning administrator did not err in the granting of the development permit and this first ground raised by the appellant should be denied.

II. **It is believed by applicants that since the property is common property it is not a "Golf Course", i.e., a parcel of land adjacent to or within the Properties developed by the Declarant or any affiliate or designee of the Declarant (a) which is owned by the Association or which is a Private Amenity, and (b) which is operated as a golf course. The Common Property in question is bounded by "Freshwater Wetlands," Kings Creek Drive, and a residence at 162 Kings Creek Drive.**

I can only assume the Appellants are again citing a portion of language from the conditions, covenants and restrictions for Sun City Hilton Head as there is no requirement for the granting of a development permit that is based upon property being designated golf course or property being designated as common property. An applicant for a development permit must show that the proposed use is compliant with the assigned zoning for the land. Block 1 of Sun City Hilton Head is designated parcel A in the Argent 2 PDD. Allowable land uses for parcel A are as follows: single-family residential, community recreation, maintenance areas, model home/sales center, multi-family residential, neighborhood commercial, open space, silviculture, recreational vehicle parks, and community center. Sun City Argent 2 PDD Section II(B). The proposed use falls within the allowed land uses for the zoning assigned to the property. Furthermore, the proposed location is designated as Golf Course on the Development Master Plan which was approved by Hardeeville Planning Commission on January 24, 2008 and by the City Council on April 22, 2008. The zoning

administrator did not err in the granting of the development permit and this second ground of the appeal should be denied.

III. Since this is not "Golf Course," surrounding property owners within 500' of the property in question were not notified of variance or special use request of this Common Property by certified mail no less than 15 calendar days prior to application of variance by developer.

A development permit application is not a variance request nor a special use request. A development permit application does not require notice by the developer by certified mail. The zoning administrator did not err in granting the development permit and the third ground for appeal should be denied.

IV. "At no time during the sale of properties at 161 and 162 Kings Creek Drive including landowners within 500' of proposed Comfort Station was proper notice in writing or verbal given to or made aware of 1.26 "Master Plan"

Appellant acknowledges the master plan is filed with Beaufort and Jasper County and may be amended, updated and supplemented from time to time. The Planned Development District and Conceptual Master Plan for Sun City Hilton Head Argent 2 was in fact recorded in the Office of the Register of Deeds for Jasper County, South Carolina in Book 608 at Page 1 on November 13, 2007. Appellant then argues that information was withheld or misrepresented since maps shown to 161 and 162 did not show a "comfort station." The zoning administrator is not a part of any sale or purchase of homes located within Sun City nor is the zoning administrator required to make a review of information provided to individual home owners during private land purchases when determining whether to issue a development permit. The zoning administrator did not err in granting the development permit and the fourth ground for appeal should be denied.

V. **"At no time following purchase of 161 and 162 Kings Creek Drives was a balloted vote advertised to all Owners with SSHH. There has never been a public hearing of this zoning application as conducted by "City"**

Appellants argue that a balloted vote was never advertised to the Owners and a survey does not serve as a balloted vote. This Board's decision on whether a survey serves as a balloted vote or not does not matter as a balloted vote nor a survey are required in order to receive a development permit. The zoning official is not required to conduct any vote or survey. The zoning official is also not required to conduct a public hearing on a development permit application. MZDO Table 6-1. The zoning administrator did not err in granting the development permit and the fifth ground for appeal should be denied.

VI. **Homeowners have a right to "quiet enjoyment" and Comfort Station is an "attractive nuisance."**

Appellants attempt to define a Comfort Station as an attractive nuisance and argue that it will impede on their inherent right of quiet enjoyment. The entire argument is faulty and is not relevant to the decision of the zoning administrator approval or denial of a development permit application. However, since the appellant has raised the issues, I shall respond to them and clarify on the legal theories of quiet enjoyment and attractive nuisance.

The doctrine of attractive nuisance provides that when an owner or occupier of land brings or artificially creates something which, from its nature, is especially attractive to children, he is bound to take reasonable pains to see that the dangerous thing is guarded so that children will not be injured by coming into contact with it. Franks v S. Cotton Oil Co. 78 S.C. at 15, 58 S.E.2d at 961 (1907). Attractive Nuisance is a doctrine created to protect children who may not understand the inherent dangerousness of things such as a swimming

pool or a dirt hill, and require for a person who constructs things such as a swimming pool or dirt hill take reasonable precautions to prevent children from entering the property. The doctrine does not apply to residents living within a gated community who feel that a Comfort Station will attract people to it and increase burglaries and shall in turn require the residents to lock their cars and houses.

Despite the name, the covenant of quiet enjoyment has nothing to do with loud music or people sitting in cars on a neighborhood street as the Appellants argue. The Covenant of Quiet Enjoyment is an agreement in a deed or a lease that states a home owner shall be entitled to possess their property without challenges to the title of ownership. A seller promises to a buyer that they will have the right to own and use their own property.

The Zoning Administrator is not required by the MZDO to review the attractive nuisance doctrine or the covenant of quite enjoyment prior to issuing a development permit. The zoning administrator did not err in granting the development permit and the sixth ground for appeal should be denied.

VII. Proposed construction will bring upsets and increase disturbances due to golf cart traffic and maintenance on structure and it infrastructure

Appellants state that construction and maintenance of the comfort station will interfere with their privacy. The zoning administrator is not required by the MZDO to review whether proposed development will interfere with an existing homeowner's privacy when issuing a development permit. The zoning administrator did not err in granting the development permit and the seventh ground for appeal should be denied

VIII. This is a "non-conforming use of property" within a residential neighborhood

Appellants argue the proposed location of the comfort station is in a residential area and the

construction of a comfort station would change the use from residential to something else. The Appellants are incorrect in their understanding of a non-conforming use. A non-conforming use is a use that is allowed before a zoning change, but would be disallowed in the new zoning district. MZDO Article 3.5. In this instance, the proposed use is one that has been allowed since the adoption of the PDD in 2007. Residential is not the only allowed land use for the property in question. The zoning administrator did not err in granting the development permit and the eighth ground for appeal should be denied.

IX. Home and property values are affected.

The appellant argues that the proposed construction interferes with the future marketing of property for resale. The zoning administrator is not required by the MZDO to research property values or the effect of property values whether positive or negative before issuing a development permit. The zoning administrator did not err in granting the development permit and the ninth ground for appeal should be denied.

X. Appellant also provides various grievances in Exhibit D, E-1, E-2, F-1 and F-2 regarding the "Schedule of Fees and Community Rules 2019"

As previously stated, the MZDO does not require or authorize the zoning administrator to review community covenants conditions and restrictions or private community rules. The enforcement of such covenants, conditions and restrictions and community rules belong to the entity identified within the documents for enforcement of such. The zoning administrator did not err in granting the development permit and the tenth ground for appeal should be denied.

CONCLUSION

For the reasons set forth above, the Board should affirm the decision of the zoning administrator. Furthermore, the Board should deny the appellants request to "clean up common area" as the board of zoning appeals does not have the authority to require a private association to clean private property.

Respectfully submitted July 3, 2019,

By s/ Prina C Maines
Prina C Maines
SC Bar No. 77947
Attorney for the Respondent